IN THE MISSOURI SUPREME COURT

No. SC85902

IN THE MATTER OF THE ESTATE OF JOHN J. BOLAND, SR.

CLAIM OF MARY FRANCES (BOLAND) HALLIDAY,

Petitioner/Appellant.

Appeal from Judgment of the Probate Division
of the Missouri Circuit Court
St. Louis, Missouri

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

Mary Frances (a/k/a Pat) Halliday appeals from a judgment of the probate court denying her claim against the estate of her former husband. The claim alleged that the decedent failed to procure life insurance naming Halliday as the beneficiary, as required by their 1981 separation agreement, which was incorporated into their dissolution decree in 1981. The judgment rests on the defense that the dissolution decree lapsed without periodic revival, and that the lapse of the decree nullified Halliday's independent contractual right to the life insurance. In holding that Mo. Rev. Stat. § 516.360(3) applied to Halliday's 1981 separation agreement and invalidated both the 1981 decree and the separation agreement, the probate court applied the statute retroactively in violation of article 1, section 13 of the Missouri Constitution. Because the statute as applied is unconstitutional, and the validity of a statute is at issue, the Missouri Supreme Court has jurisdiction over the appeal. *See* Mo. Const. art. V, §3; *Smith v. Coffey*, 37 S.W.3d 797 (Mo. banc 2001); *Beatty v. Metro St. Louis Sewer Dist.*, 700 S.W.2d 831, 834 (Mo. banc 1985).

STATEMENT OF FACTS

Appellant Mary Frances Halliday (a/k/a "Pat") married the decedent John J. Boland, Sr. in 1975. The couple later separated and on July 7, 1981, they signed a separation agreement. As part of the agreement, John promised to pay Pat monthly maintenance and to make her the beneficiary on a $50,000 life insurance policy, payable upon his death. The life-insurance provision was part of the maintenance award. The Separation Agreement provided:

> **D. MAINTENANCE**
>
> 1. The parties agree, after examining all relevant factors, including the situation of both parties at the present as reflected in the Income & Expense statements filed in this cause, and in light of Wife's expressed desire to seek experience or training to equip her for gainful employment, that it is reasonable for and Husband agrees to pay to Wife maintenance as follows:
>
> A. $2,500 per month for a period of twelve months, commencing July 1, 1981 and ending June 30, 1982;
>
> B. $2,000 per month for a period of twelve months, commencing July 1, 1982 and ending June 30, 1983;
>
> C. $1,500 per month commencing July 1, 1983 and continuing thereafter,

> Said maintenance payments shall continue until the first to occur of:
>
> A. Wife's remarriage
>
> B. The death of either party;
>
> C. The amount and/or period of time is modified by the Court.
>
> . . .
>
> 3. Additionally, Husband shall keep in full force and effect life insurance covering his life in the principal sum of not less than $50,000, upon which Wife is irrevocably designated as the beneficiary during her lifetime. Such life insurance shall not be payable to Wife in the event of her remarriage, prior to Husband's death. Husband shall exhibit to Wife, upon her reasonable request, at reasonable intervals, evidence that she continues to be designated irrevocably as the beneficiary on such policy of insurance.

(*See* Legal File at 23-24.) On July 9, 1981, a decree was entered dissolving the marriage. The decree incorporated the separation agreement. (*See* Legal File at 20.) Another provision in the settlement agreement provided that if some part of it was unenforceable when incorporated into the decree, that part could be enforceable in an action in contract:

> **SEVERABILITY OF PROVISIONS** – In the event that any provision of this Agreement is unenforceable when incorporated as part of the Court's judgment, it shall be considered severable and enforceable by an action based on contractual obligation and it shall not invalidate the remainder of this Agreement as incorporated in any Decree.

(*See* Legal File at 24-25.)

Pat never remarried, and John paid the monthly maintenance up until he died. (*See* Tr. of 3/2/2004, at 5-6.) In the late 1980s, John tried to modify the Separation Agreement and Decree, but his petition for modification was rejected. *See Halliday v. Boland*, 813 S.W.2d 34 (Mo. App. E.D. 1991). In the early 1990s, John sent Pat a copy of a letter he allegedly sent to his insurance company. The letter, dated February 12, 1990, asked the company to split the death benefit on his policy into two parts, with $50,000 for Pat and the remainder to his trust for the benefit of John's children. (*See* Legal File at 33.) Pat interpreted that letter as "reasonable assurance" that she was named in his life insurance policy as a death beneficiary for $50,000. (Tr. at 7.)

John died on or about February 15, 2003. His last will and testament was filed, along with the death certificate, on about May 16, 2003. Pat made a demand for payment of the $50,000 death benefit, but did not receive it. (Tr. at 8.) On March 12, her attorney, Leonard J. Frankel, spoke to Edward Vancil, the attorney representing the Boland estate. Vancil contended in that conversation that in order to enforce the obligations of the

divorce decree, it had to be revived every ten years, even though John continued to pay the maintenance. (*See* Legal File at 52-53, 54.)

Pat filed her claim in the probate proceeding alleging a breach of contract for failing to keep the promised life insurance in full force and effect. (Legal File at 16.) (Originally filed, August 19, 2003, but returned because no Estate had been opened; then refiled Sept. 25 with a Petition to Require Administration docketed September 25, 2003. Legal File 1, 16-33.) Defense counsel re-entered his Appearance (Legal .File 34), and arranged for Publication of small Estate Affidavit and Publication of Notice of claims (Legal File 1, 38), and filed and Notice the Hearing on the merits of the claim for March 2, 2004. (Legal File 36).

On March 2, 2004, the Probate Court, the Honorable B.C. Drumm, Jr., presiding, held a hearing on the claim. The principal legal issue was whether Mo. Rev. Stat. § 516.350, the revival statute, barred Pat's claim. On March 8, 2004, the court denied the claim. (*See* Legal File at 65.) The notice of appeal was filed on March 15, 2004, along with a Jurisdictional Statement. (*See* Legal File at 66-74.)

POINTS RELIED ON

I. The probate court erred in denying Halliday's claim, because applying Mo. Rev. Stat. § 516.350(3) in this case violated the contracts clause and the vested-rights clause in article 1, section 13 of the Missouri Constitution, in that the decree was entered before Mo. Rev. Stat. § 516.350(3) was enacted, and applying it to the 1981 decree impaired Halliday's independent contractual rights and vested interests.

Mo. Const. art. 1, § 13;

(1) Silcox v. Silcox, 6 S.W.3d 899 (Mo. banc 1999);

(2) Mendelsohn v. State Bd. of Regis. for the Healing Arts, 3 S.W.3d 783 (Mo. banc 1999);

(3) *Holt v. Holt*, 635 S.W.2d 335 (Mo. banc 1982);

(4) Chenault v. Yates, 216 S.W. 817, 818 (K.C. 1919);

II. The probate court erred in denying the claim, because Mo. Rev. Stat. Ann § 516.350(1) excepts maintenance payments from the ten-year bar for money judgments and Mo. Rev. Stat. Ann §516.350(2) provides that the ten-year bar applies to each separate maintenance payment, in that the promise to provide insurance set forth in the 1981 settlement agreement is a promise of maintenance.

Mo. Rev. Stat. Ann. § 516.350(1), (2) (West 2002);

(1)Holt v. Holt, 635 S.W.2d 335 (Mo. banc 1982);

(2) Foster v. Foster, 39 S.W.3d 523 (Mo. App. E.D. 2001);

(3) Helfenbein v. Helfenbein, 871 S.W.2d 131 (Mo. App. E.D. 1994).

III. The probate court erred in denying the claim, because Mo. Rev. Stat. Ann § 516.350(3) applies to divisions and periodic payments of employee benefits, which may include certain life-insurance benefits, in that the promise of life insurance in the 1981 settlement agreement is wholly unrelated to a division of employee benefits as contemplated by Mo. Rev. Stat. Ann § 516.350(3).

(1)Foster v. Foster, 39 S.W.3d 523 (Mo. App. E.D. 2001).

IV. The probate court erred in applying *Hanff v. Hanff*, because it does not bar Halliday's claim, in that *Hanff* and the precedent it cites involved divorce decrees requiring the payment of a sum certain (an enforcement of a judgment), and this case involves an on-going promise to maintain someone as the beneficiary of a life-insurance policy, a breach of contract that did not accrue until Boland died.

(1) *Principal Mut. Life Ins. Co. v. Karney*, 5 F. Supp. 2d 720 (E.D. Mo. 1998);

(2) Remmele v. Remmele, 853 S.W.2d 476 (Mo. App. W.D. 1993);

(3) Boatmen's Trust Co. v. Long, 16 S.W.3d 662 (Mo. App. E.D. 2000).

ARGUMENT

I. THE PROBATE COURT ERRED IN DENYING HALLIDAY'S CLAIM, BECAUSE APPLYING Mo. Rev. Stat. Ann § 516.350(3) IN THIS CASE VIOLATED ARTICLE 1, § 13 OF THE MISSOURI CONSTITUTION, IN THAT THE DECREE WAS ENTERED BEFORE Mo. Rev. Stat. Ann § 516.350(3) WAS ENACTED AND APPLYING THAT STATUTE TO THE DECREE IMPAIRED HALLIDAY'S INDEPENDENT CONTRACTUAL RIGHTS AND VESTED INTERESTS.

The probate court denied Halliday's claim without a written opinion, apparently on the grounds suggested by the Estate, namely, that under Mo. Rev. Stat. § 316.350(3), the decree lapsed, and the lapse made the decree unenforceable, such that Halliday's contractual right to life-insurance benefits was extinguished.[1] Section 516.350 relates to revival of judgments. It provides generally that unless revived, a judgment is conclusively presumed to be paid after ten years, subject to various exceptions. Mo. Rev. Stat. Ann. § 516.350(1) (West 2002). One exception is that a decree ordering periodic payments of child support and maintenance does not lapse until ten years after each periodic payment is due. *Id.* § 516.350(2). Another provision of the statute specifically addresses the division and periodic payments of various employee benefits. *Id.* § 516.350(3). It was this section, the Estate argued, that barred the claim on the separation agreement. It provides:

> In any judgment, order, or decree dividing pension, retirement, life insurance, or other employee benefits in connection with a dissolution of marriage, legal separation or annulment, each periodic payment shall be presumed paid and satisfied after the expiration of ten years from the date that the periodic payment is due, unless the judgment has been otherwise revived as set out in subsection 1 of this section. This subsection shall take effect as to all such judgments, orders, or decrees which have not been presumed paid pursuant to subsection 1 of this section as of August 28, 2001.

Id.

Leaving aside for now the point that Halliday's claim does not involve a division or periodic payment of any *employee benefits*, such that § 516.350(3) would apply, *see* Pt. III, *infra*, the application of the section to Halliday's claim against the Estate invalidated her right of action for breach of contract as well as her vested rights under the decree. In other words, the probate court applied § 516.350(3) retrospectively in violation of the Missouri Constitution, which provides:

> **That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation,**

[1] The Estate did not file a responsive pleading to Halliday's claim.

or making any irrevocable grant of special privileges or immunities, can be enacted.

Mo. Const. art. I, § 13.

A retrospective law is one that "takes away or impairs vested or substantial rights acquired under existing laws, or imposes new obligations, duties or disabilities with respect to past transactions." *Mendelsohn v. State Bd. of Regis. for the Healing Arts*, 3 S.W.3d 783, 785-86 (Mo. 1999). A vested right is not merely an expectation that existing law will remain unchanged. Rather, a vested right is something that "'*must have become titled*, legal or equitable, to the present *or future enjoyment* of property . . . .'" *Silcox v. Silcox*, 6 S.W.3d 899, 904 (Mo. banc 1999) (emphasis added) (quoting *Fisher v. Reorganized Sch. Dist.*, 567 S.W.2d 647, 649 (Mo. banc 1978)). Thus, a statute which affects past transactions to the substantial prejudice of the interested parties violates Article I, section 13.

This constitutional provision recognizes the common-law presumption that statutes will apply prospectively only, except when (1) the legislature specifically intends that it apply retrospectively, or (2) the statute is remedial or procedural. *Files v. Wetterau, Inc.*, 998 S.W.2d 95, 97 (Mo. App. E.D. 1999). The difference between a substantive law and a procedural law is that a "substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit." *Id.*

Here, the portion of the revival statute at issue did not exist until long after the Decree was entered. In 1981 the revival statute provided:

> Every judgment, order or decree of any court of record of the United States, or of this or any other state, territory or country, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof, or if the same has been revived upon personal service duly had upon the defendant or defendants therein, then after ten years from and after such revival, or in case a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years from the date of the original rendition or revival upon personal service, or from the date of the last payment, such judgment shall be conclusively presumed to be paid, and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever.

Mo. Rev. Stat. Ann. § 516.350 (West 1952).

In 1982, the statute was amended. Subsection (1) was amended to add the exception for child-support and maintenance payments mandated over a period of time and subsection (2) was added. *See* L. 1982, p. 644, § A. Subsection (2) provides:

> In any judgment, order, or decree awarding child support or maintenance, each periodic payment shall be presumed paid and satisfied after the expiration of ten years from the date that periodic payment is due, unless the judgment has been otherwise revived as set out in subsection 1 of this section. This subsection shall take effect as to all such judgments, orders, or decrees which have not been presumed paid pursuant to subsection 1 of this section as of August 31, 1982.

Id. § 516.350(2) (West 2002).

In 1982 the Missouri Supreme Court was presented with a case in which the appellant argued that, with respect to child-support payments, the pre-1982 revival statute violated the Equal Protection and Due Process Clauses of the United States and Missouri Constitutions. *See Holt v. Holt*, 635 S.W.2d 335 (Mo. banc 1982). The court did not answer the constitutional questions, but nevertheless reversed a lower court's blind adherence to the old § 516.350 to deny support payments ordered in a 1970 decree. It noted that prior case law "failed to recognize the peculiar nature of future periodic payments and instead relied on cases which are inapplicable." *Id.* at 336. These

payments, the court stated, are "categorically different" than "sum-certain" judgments. *Id.* at 337.

> All other judgments remedy past wrongs in a sum certain. Periodic maintenance and child-support orders are aimed toward the future. The word "order" is used because at the time a decree awarding maintenance or child support is issued, it looks to the future and is not at that time (when entered) a judgment of sum then due and owing as are most other awards of money. Other money judgments, by their nature, constitute a fixed sum. The amount of future installment payments is uncertain. Unlike sum certain judgments, they are subject to future modifications, contingencies, and even termination. Consequently, while execution may issue at any point within the ten years after rendition of a sum certain judgment . . . execution cannot issue with respect to future installment payments. Hence a former spouse .. . cannot collect presently future periodic payments.

Id. *Holt* undermined the entire line of cases holding that maintenance orders divorce decrees would have to be revived in order to collect future maintenance payments. To ensure a uniform and fair result for decrees entered before the revival statute was

amended, the court concluded that the wife was entitled to relief under the amended statute. *Id.*

Holt thus provides that when the decree in this case was entered, the promises of future maintenance incorporated in the decree in this case were not money judgments for a sum certain that would be subject to the strict period set forth in the old statute. Instead, they were *excepted* from the conclusive presumption in § 516.350(1). This exception continued after the ten-year anniversary of the decree in 1991, because Boland was still required to pay maintenance, as Halliday had not remarried or died. Boland's promise to "keep in full force and effect" life insurance naming Halliday as the beneficiary upon his death was made as part of the settlement agreement's provision of ongoing maintenance. (*See* Legal File at 23-24.) As a form of maintenance—the final payment—the ten-year bar could not apply until the payment was to be made. *See Foster v. Foster*, 39 S.W.3d 523, 527-28 (Mo. App. E.D. 2001) (decree required husband to maintain health insurance, which was a form of maintenance, and wife was entitled to reimbursement for premium payments that came due in the ten years preceding her action).

The enactment of § 516.350(3) in 2001, *see* L. 2001, S.B. No. 10, § A, cannot be applied in a manner that would impair Halliday's right to the maintenance payments, including the insurance benefit. A great number of cases have held that amendments to the revival statute cannot affect a previously entered judgment. Many of these cases were decided over a century ago, when the term in the revival statute was reduced from twenty years to ten. *See, e.g.*, *Tice v. Fleming*, 173 Mo. 49, 72 S.W. 689 (1903); *McFaul v. Haley*, 166 Mo. 56, 65 S.W.995 (1901); *Cranmor v. School Dist.*, 151 Mo. 119, 52 S.W.

232 (1899). The cases concluded that, to hold that the statute's shorter time period applied to the preexisting judgment "would make it as to those judgments unconstitutional. This for the reason that to hold otherwise the statute might unduly cut short the time for the holder of such a judgment to sue, thereby depriving him of vested rights." *Chenault v. Yates*, 216 S.W. 817, 818 (Mo. Ct. App. 1919) (citing *Tice*, 72 S.W. 689). In another case, the court explained the vested rights involved:

> When the judgment was rendered, the plaintiff became clothed and vested with certain rights in respect to it, and amongst which was that conferred by § 3251 [Mo. Rev. Stat. 1879] . . . to rebut the presumption of payment. . . . This right was one which the Legislature could not and did not undertake by the Act of 1895 to disturb or impair.

Chiles v. Sch. Dist. of Buckner, 103 Mo. App. 240, 77 S.W. 82 (K.C. 1903). *See also Winkleman v. Des Moines & Mississippi Levee Dist. No. 1*, 171 Mo. App. 9, 153 S.W. 539, 542 (St. Louis 1913) ("[T]he amendment of 1895 is not applicable *at all* to judgments recovered prior to its enactment.").

Because § 516.350(3) cannot be applied to impair a previously existing right to periodic payments without violating the Missouri Constitution, the probate court erred in denying Halliday's claim against Boland's estate.

II. THE PROBATE COURT ERRED IN DENYING THE CLAIM, BECAUSE § 516.350(1) EXCEPTS MAINTENANCE PAYMENTS FROM THE TEN-

YEAR BAR FOR MONEY JUDGMENTS AND § 516.350(2) PROVIDES THAT THE TEN-YEAR BAR APPLIES TO EACH SEPARATE MAINTENANCE PAYMENT, IN THAT THE PROMISE TO PROVIDE INSURANCE SET FORTH IN THE 1981 SETTLEMENT AGREEMENT IS A PROMISE OF MAINTENANCE.

As discussed above, the settlement agreement entered into between Boland and Halliday contemplated that the life insurance Boland was required to maintain for Halliday's benefit was a species of periodic maintenance. This is evident from the fact that in the paragraph entitled "MAINTENANCE," Boland promised to make monthly payments to Halliday and maintain the insurance policy so that after he died, Halliday would receive a lump sum of $50,000 as a final payment of maintenance. Case law holds that insurance is a form of maintenance. *See Foster*, 39 S.W.2d at 527-28 (citing, inter alia, *Mason v. Mason*, 873 S.W.2d 631, 634 (Mo. App. E.D. 1994); *Huska v. Huska*, 721 S.W.2d 120, 121 (Mo. App. E.D. 1986); *Liberty v. Liberty*, 826 S.W.2d 381, 385 (Mo. App. E.D. 1992)). Although the cases deal principally with medical insurance, they recognize that maintaining the insurance permits the payee spouse to continue—to keep or maintain—the protection the insurance provides. This case is no different, even though it involves a final payment in the form of a life-insurance death benefit.

Because the promise to provide a life-insurance death benefit was part of the promise to pay maintenance, it follows that the promise must be excepted from the

general ten-year bar on enforcement of judgments set forth in § 516.350(1). That section provides:

> Every judgment, order or decree of any court of record of the United States, or of this or any other state, territory or country, *except for any judgment, order or decree awarding child support or maintenance* . . . in connection with a dissolution of marriage, legal separation or annulment which mandates the making of payments *over a period of time or payments in the future*, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof, or if the same has been revived upon personal service duly had upon the defendant or defendants therein, then after ten years from and after such revival, or in case a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years from the date of the original rendition or revival upon personal service, or from the date of the last payment, such judgment shall be conclusively presumed to be paid, and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever.

Mo. Rev. Stat. Ann. § 516-350(1) (West 2002) (emphasis added).

In *Helfenbein v. Helfenbein*, 871 S.W.2d 131 (Mo. App. E.D. 1994), the wife sought to revive a 1976 decree ordering payment of maintenance. A consent judgment relating to the payments the husband had not made was entered in 1981. It ordered him to resume making the payments decreed in 1976, but he stopped making the payments in 1983. The wife obtained a writ of garnishment in December 1992 and a few months later filed a motion to revive the decree. The husband filed a motion to quash the garnishment and contended that the consent decree could not be enforced, arguing that § 516.350(2), which had been passed after the consent decree was entered, did not save the decree from lapse. The appellate court disagreed. It pointed out that, because the decree had not been *adjudicated* to have lapsed before § 516.350(2), the subsection applied to save the decree from lapse. (In *Holt*, of course, this Court pointed out that the prior law holding that periodic payments were subject to the ten-year limitations period were, in essence, wrongly decided. *See Holt v. Holt*, 635 S.W.2d 335.)

Because the promise to maintain the life-insurance policy was a form of periodic maintenance—indeed it was the final payment—and because periodic maintenance payments are excepted from the ten-year bar set forth in § 516.350(1), it follows that the probate court erred in denying Halliday's claim against Boland's estate.

III. THE PROBATE COURT ERRED IN DENYING THE CLAIM, BECAUSE SECTION 516.350(3) APPLIES TO DIVISIONS AND PERIODIC PAYMENTS OF EMPLOYEE BENEFITS, IN THAT THE PROMISE OF

LIFE INSURANCE IS WHOLLY UNRELATED TO A DIVISION OF EMPLOYEE BENEFITS AS CONTEMPLATED BY § 526.350(3).

By its terms, § 513.350(3) does not apply in this case. Thus, the Probate Court erred in denying Halliday's claim. Subsection (3) provides:

> In any judgment, order, or decree *dividing* pension, retirement, life insurance, or other *employee benefits* in connection with a dissolution of marriage, legal separation or annulment, each periodic payment shall be presumed paid and satisfied after the expiration of ten years from the date the periodic payment is due, unless the judgment has been otherwise revived as set out in subsection 1 of this section. This subsection shall take effect as to all such judgments, orders, or decrees which have not been presumed paid pursuant to subsection 1 of this section as of August 28, 2001.

Mo. Rev. Stat. Ann. § 516.350(3) (West 2002) (emphasis added).

The dispute in this case is not based on a *division or periodic payment of employee benefits* as subsection (3) contemplates. Instead, it involves a promise to maintain a life insurance policy naming Halliday as the beneficiary of the death benefit. This is "maintenance," not an employee benefit, and it is not a periodic payment of an employee benefit. *See Foster*, 39 S.W.3d 523. There can be no "periodic payment" of such an

agreement as subsection (3) contemplates, and no *payment* was due until after Boland died. Subsection (3) does not even apply to this case.

Because subsection (3), by its terms, does not apply to this case, the probate court erred in denying Halliday's claim against Boland's estate.

IV. THE PROBATE COURT ERRED IN APPLYING *HANFF V. HANFF,* BECAUSE IT DOES NOT BAR HALLIDAY'S CLAIM, IN THAT *HANFF* AND THE PRECEDENT IT CITES INVOLVED DECREES FOR PAYMENT OF MONEY, AND THIS CASE INVOLVES AN ON-GOING PROMISE TO PERFORM.

The Estate argued below that *Hanff v. Hanff*, 987 S.W.2d 352 (Mo. App. E.D. 1998), provided the rule of decision in this case. Because this case is completely different than *Hanff*, the Probate Court erred in applying it here.

In *Hanff*, the decree was entered in 1984. It required the decedent to keep his first wife as the beneficiary the his pension fund and all life-insurance policies in existence at the date of separation. *Id.* at 354. The decedent remarried and substituted his second wife as beneficiary on the pension fund and one insurance policy. He also replaced a second policy naming the first wife with a policy naming the second wife as beneficiary. *Id.* He continued to tell his first wife, however, that she was still the beneficiary. Although the decree also required him to make monthly maintenance payments he never did. *Id.* His second wife became aware of his obligations under the decree after he had made the changes.

After the husband died, the first wife learned that she was no longer the beneficiary, and the second wife claimed the pension and insurance benefits. The first wife sued the second wife directly, seeking the imposition of a constructive trust. She did not file a claim against the estate. The trial court entered judgment for the first wife, but the appellate court reversed. The first wife argued on appeal that the revival statute did not bar her cause of action because it did not accrue until she discovered that the husband had violated the decree. *Id.* at 355. The appellate court stated that the limitations statutes the first wife relied on did not toll the period set forth in § 516.350, because they applied to causes of action, not enforcement of judgments. *Id.* at 355-56. It concluded that § 516.350 determines the time in which a judgment may be enforced, and the only exceptions are those set forth in the statute. *Id.* at 356. The court held that, "[a]bsent timely revival, section 516.350 plainly forbids the enforcement of judgments over ten years old by conclusively presuming the judgments have been paid." *Id.*

Hanff is easily distinguishable from this case. First, the Separation Agreement that Boland signed in 1981 had a severability clause. The *Hanff* opinion does not mention one. The clause in the Halliday/Boland agreement provides that: "[i]n the event that any provision of this Agreement is unenforceable when incorporated as part of the Court's judgment, *it shall be considered severable and enforceable by an action based on contractual obligation and it shall not invalidate the remainder of this Agreement as incorporated in any Decree.*" (*See* Legal File at 24-25.) The law in 1981 required that when a judgment ordered periodic payments, the payee had to ensure that each payment was duly entered into the record of the judgment in order to have the revival period run

from the date of the last periodic payment. *See* Mo. Rev. Stat. Ann. § 516.350 (West 1952); *Tudor v. Tudor*, 617 S.W.2d 610 (Mo. App. S.D. 1981). The severability clause avoids that trap for the unwary.

Missouri construes settlement agreements like any other contract and they must be enforced consistent with the parties' intent and according to their terms. *See Blackman v. Blackman*, 767 S.W.2d 54, 59 (Mo. App. W.D. 1989). Here the parties intended to protect their agreement against the possibility that it might lapse with the decree. Consequently, even if the decree lapsed, the agreement did not. Indeed, the promise to maintain insurance could not be "satisfied" within ten years if Boland lived longer than that (which he did). Thus, the asserted expiration of the decree has no effect on Boland's promise or Halliday's breach of contract claim.

Second, *Hanff* is distinguishable because it involved a direct action against a person not a party to the contract (the second wife) rather than a claim against the husband's estate. In *Hanff*, there were strategic reasons for suing the second wife, principally that the probate estate had few assets and the claim would probably be uncollectible. But the lack of probate assets did not justify holding his second wife liable for her husband's debts. *See* 987 S.W.2d at 357 n.3. Indeed, the *Hanff* court explicitly stated that "[t]he proper procedure for collecting judgment for past due support from a deceased spouse is to file against the spouse's estate." *Id.* at 357. That is exactly what Halliday did.

Third, *Hanff* overstretches the language of § 516.360. The revival statute applies to payments of money (subsection 1, providing that the judgment is presumed "paid and

satisfied"), periodic payments of child support or maintenance (subsection 2), and divisions of employee benefits incident to a divorce (subsection 3). This case does not involve a dispute over the failure to pay a judgment; it involves Boland's breach his promise to maintain a $50,000 life insurance policy naming Halliday as the beneficiary. This breach of contract claim did not even accrue until Boland died. It makes no sense to require parties to a divorce decree to go back to court every ten years to ensure that a continuing promise set forth in a settlement agreement (as opposed to an ordered payment of money or division of marital property existing at the time of the decree) can be enforced. Indeed, *Holt* mandates otherwise. *See Holt v. Holt*, 635 S.W.2d 335.

A case with closely analogous facts illustrates this point. In *Principal Mutual Life Ins. Co. v. Karney*, 5 F. Supp. 2d 720 (E.D. Mo. 1998), an insurer brought an interpleader action to determine who was entitled to the proceeds of a life-insurance policy. The decedent had married three times, had two children from his first marriage, two children from his second marriage, and none from his third marriage. *Id.* at 724. The first marriage was dissolved in 1982 and the divorce decree specifically incorporated the parties' separation agreement. That agreement required the husband (the decedent) to "maintain in full force an effect an insurance trust . . . naming the children the beneficiaries of not less than One Hundred Thousand Dollars . . . face value of the proceeds . . . ." *See id*. at 724. Many years later, the decedent married his third wife and named her as the beneficiary of the insurance policy that was to fund the trust. *Id.* at 725. After he died, his first wife *submitted a claim* to the estate on behalf of her younger daughter who was not then twenty-one years old. The third wife contended that the claim

was untimely because it came ten years after the decree was entered, and the decree had not been revived.

The district court roundly rejected that argument. It pointed out that "[t]he logical extension of [the third wife's] argument is that divorced persons would have to go to court no more than every ten . . . years to 'revive' their divorce decree; otherwise, their divorce decree would be nullified." *Id.* at 726. The court addressed the two cases the third wife cited, *Pirtle v. Cook*, 956 S.W.2d 235 (Mo. 1997) and *Ronollo v. Ronollo*, 936 S.W.2d 188 (Mo. App. E. D. 1996), and distinguished them. (These were the two cases the *Hanff* court relied on.) Both those cases involved divorce decrees which ordered the payment of a set amount of money. In *Pirtle*, the wife was entitled to $40,000 to be paid out of the sale of some marital property; in *Ronollo*, the wife's attorney was entitled to fees totaling $5000 from the husband. Both cases, the district court noted, involved *judgments for the payment of money*, the amount of which was clearly denoted in the decree. Neither mentioned a severability clause in the separation agreements. (*Cf.* Legal File at 24-25.)

The agreement to maintain the insurance policy for the benefit of the children, however, was not a judgment for a sum certain, and the court followed *Remmele v. Remmele*, 853 S.W.2d 476 (Mo. App. W.D. 1993), instead. In *Remmele*, the parties divorced in 1972. Their separation agreement required the husband to execute an irrevocable will naming his children as the sole equal beneficiaries of his estate. The agreement was incorporated into the decree. When the husband died eighteen years later, his children discovered that they had not been named in his will as the sole, equal

beneficiaries of the estate. They sued the estate seeking enforcement of the will provision. The court held that because the action was one for breach of contract, the children had five years from the date of breach (the date of their father's death) in which to bring the action. Thus the action was timely. *Id.* at 478-81, *cited in Karney*, 5 F. Supp. 2d at 727.

The district court in *Karney*, applying *Remmele*, concluded that the wife had a viable claim based on the promise in the separation agreement. It noted that the separation agreement did not set a deadline for creation of the "insurance trust" for the children's benefit, though it clearly provided for a minimum of $100,000 in life insurance benefits for them.

> Up until the time of their father's death, the only claim that existed was to force Mark to create an actual document comporting with the specifics of Paragraph 5. Mark's failure to do so was a technical breach of his commitment, which fails to commence the running of the limitations period. Damages were neither sustained nor capable of ascertainment, as required under § 516.100 R.W. Mo., until Mark died.

Id. at 728. To be an injury that would start the limitations clock, it must be *actually* sustained and capable of ascertainment before the right to sue arises. *Id.*

The difference between *Karney* and this case is that the amount of Boland's obligation was ascertained at the time the decree was entered. The significant point, however, is that the agreement required Boland to *maintain* the policy, which is an ongoing obligation, and no injury would be *actually sustained* if he failed to comply until he died. The obligation was not reduced to a money judgment, as occurred in *Pirtle* or *Ronollo*. Thus, like *Hanff*, those cases do not provide the rule of decision. *See also Boatmen's Trust Co. v. Long*, 16 S.W.3d 662 (Mo. App. E.D. 2000) (although 1971 settlement agreement merged into the decree, promise to make will dividing assets equally among parties' children was independently enforceable, because when decree was entered, parties could bring separate actions on the agreement, despite entry of the decree).

This Court should rule that § 516.360 applies to three specific situations, payments on judgments, periodic payments of child support and maintenance, and divisions and periodic payments of employee benefits, It does not apply to a continuing contractual obligation not involving one of those situations, especially one where the breach may not be discovered for years after the entry of the decree. A promise to maintain life insurance is not something that can be reduced to a money judgment until the promise is breached and the cause of action accrues.

CONCLUSION

For the reasons stated above, this Court should reverse the probate court's denial of Halliday's claim and remand the case for judgment in favor of Pat Halliday, and calculation of attorney fees and costs.

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CERTIFICATE OF COMPLIANCE AND SERVICE

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who by his signature below hereby certifies that this APPELLANTS' BRIEF complies with Rule 84.06(b), and contains **6650 words**, not including the cover, certificate of service, certificate of compliance, signature block or appendix, and that accompanying diskette with an electronic copy of the brief has been scanned and is virus-free.

Counsel for Appellant certifies further that he mailed one original and ten paper copies of this brief to the Clerk of the Supreme Court for filing, along with a virus-free diskette containing the electronic copy of this brief, and that he sent one paper copy and one diskette to each of the attorneys for the Estate of John Boland, listed below, in compliance with Rule 84.06(a) and (g).

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